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IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE; VETERANS OF FOREIGN WARS, DEPARTMENT OF NORTH DAKOTA,
Petitioners,

v.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 6, 2006

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QUESTION PRESENTED

Did the Eighth Circuit err when it upheld North Dakota's extension of the national do-not-call registry (which expressly exempts all charitable speech and is represented by the FTC to exempt charitable speech) to charitable speech by charities employing professional fundraisers, while exempting other charitable and commercial speech?

CORPORATE DISCLOSURE

Neither Petitioner has any parent company nor does any public company own any stock of either Petitioner.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	8
ARGUMENT	11
A. North Dakota Stands Alone in Attempting to Subject Charitable Calls to Do-Not-Call List Restrictions Applicable to Core Commercial Speech	11
B. The Eighth Circuit's "Lesser Scrutiny" of the Act's Do-Not-Call Restrictions Violates Fundamental First Amendment Principles	14
1. The Eighth Circuit Improperly Applied to Charitable Calls the "More Lenient" Intermediate Scrutiny Standard of Review Applicable to Core Commercial Speech	14
2. The Majority Below Failed to Require North Dakota To Meet Its Burden of Justifying Regulation of Charitable Speech	18
3. The Eighth Circuit's Erroneous Fourth Circuit Citation Led It to Uphold an Under-Inclusive Speech Restriction that Discriminates Against Smaller, Less-Popular Charities	21

TABLE OF CONTENTS—Continued

Page

4. The Eighth Circuit's Erroneous Fourth Circuit Citation Also Led It to Uphold an Over-Inclusive First Amendment Infringement of Charitable Speech 26

CONCLUSION 29

TABLE OF AUTHORITES

CASES — Page

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 23
Bartnicki v. Vopper, 532 U.S. 514 (2001) 18, 26
Carey v. Brown, 447 U.S. 455 (1980) 23
Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557 (1980) 15
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 12
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 23, 25
Clear Channel Outdoor, Inc. v. City of St. Paul, 02-1060, 2003 U.S. Dist. LEXIS 13751 (D.Minn. 2003) 24
Edenfield v. Fane, 507 U.S. 761 (1993) 28
Florida Star v. B.J.F., 491 U.S. 524 (1989) 22
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 27-28
Gordon and Breach Science Publishers v. American Institute of Physics, 859 F. Supp. 1521 (S.D.N.Y 1994) 15
Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173 (1999) 18, 22
Illinois ex rel Madigan v. Telemarketing Associates, Inc. 538 U.S. 600 (2003) 19, 26
Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32 (1999) 25
Mainstream Marketing Services Inc. v. Federal Trade Comm'n, 358 F. 3d 1228 (10th Cir. 2004) ..... *passim*
McConnell v. Federal Election Com'n, 540 U.S. 93 (2003) 15

TABLE OF AUTHORITES—Continued

Page

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 15, 27
Meyer v. Grant, 486 U.S. 414 (1988) 19
National Federation of the Blind v. Federal Trade Comm'n, 420 F. 3d 331 (4th Cir. 2005) ..... *passim*
Optimist Club of North Raleigh, North Carolina v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982) 20
Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 391 Mass. 709 (Mass. 1984) 21
Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972) 22-23
Riley v. National Federation of Blind, 487 U.S. 781 (1988) ..... *passim*
Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 15, 16, 20
Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) 15, 21
Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 25
Special Programs, Inc. v. Courter, 923 F.Supp. 851 (E.D. Va. 1996) 23
Ward v. Rock Against Racism, 491 U.S. 871 (1989) 17
WRG Enterprises, Inc. v. Crowell, 758 S.W.2d 214 (Tenn. 1988) 20
United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 18, 25, 28

CITATIONS OF ORDERS ENTERED IN CASE

Fraternal Order of Police v. Stenehjem, 287 F. Supp. 2d 1023 (Dist. N.D. 2003) 9, 16, 18, 19
Fraternal Order of Police v. Stenehjem, 431 F.3d 591 (8th Cir. 2005) ..... *passim*

TABLE OF AUTHORITIES—Continued

U.S. CONSTITUTION Page

Amendment I ..... *passim*
Amendment XIV 2, 34

STATUTES AND REGULATIONS

28 U.S.C. § 1254(l) 1
42 U.S.C. § 1983 2
42 U.S.C. § 1988 ..... 3, 9
47 U.S.C. § 227 13
16 C.F.R. § 310.4 ..... 11, 12
16 C.F.R. § 310.6 12
47 C.F.R. § 64.1200 11
North Dakota Century Code §51-28-01 *et seq.* ..... *passim*

OTHER

68 Fed. Reg. 44144 (July 25, 2003) 13, 15
68 Fed. Reg. 4580 (January 29, 2003) 12, 15, 17, 27

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JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on December 7, 2005. The jurisdiction for this Court is evoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case is a facial challenge to the constitutionality of North Dakota Senate Bill 2255, codified at N.D. Cent. Code Chapter 51-28-01 et seq. The Act is included in full in the

Appendix at App. 27a-36a. The United States Constitution First and Fourteenth Amendments provide:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

And

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Petitioners' claims are brought pursuant to 42 U.S.C. §§ 1983 and 1988:

Section 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this

section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

And

Section 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. 2000cc et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee

as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. (c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF FACTS

1. During the 2003 Legislative Session, the North Dakota Legislature passed Senate Bill 2255, codified at N.D. Cent. Code Chapter 51-28-01 et seq. (the "Act"). The Act prohibits entities defined as "telephone solicitors" from calling North Dakota residents who register with the state's "do-not-call" list. There are several categories of callers and charitable and commercial calls that are exempt from this Act's restrictions.

2. On July 30, 2003, the Fraternal Order of Police and other nonprofit organizations ("the Charities") filed this lawsuit challenging the constitutionality of the Act. The Charities requested that the legislation be declared unconstitutional on its face. Appellee, Fraternal Order of Police, North Dakota State Lodge ("FOP"), is a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(8). Appellee, Veterans of Foreign Wars-Department of North Dakota ("VFW"), is also a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(19). The Charities hire compensated professionals to solicit funds for them because they have neither the means nor expertise to raise sufficient funds using employees or volunteers.

3. The Charities are therefore defined as telephone solicitors under the Act, which prevents them from hiring